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About a Concept of *Ordre Public* in Law of Kazakhstan

1. Since 1999, when the Special Part of the Civil Code of the Republic of Kazakhstan (and Section VII "Private International Law" is among its other structural components) was adopted, the notion of *ordre public* has gained its legislative framework.[1]

In 2004 the term "public order" got its legislative definition for first time. Particularly, in subparagraph 1) of Article 2 of the Old Law on International Arbitration (which is no longer in force since adoption of the acting Arbitration Law in 2016)[2] the term "public order of the Republic of Kazakhstan" was defined as "foundations of the state [governmental] and social structures enshrined in legislative acts of the Republic of Kazakhstan".[3] In 2013 the same definition was included in the Old Law on Domestic Arbitrages (which was adopted at the same time as the Old Law on International Arbitration and which was also terminated in 2016).[4]

Since 2016, according to subparagraph 1) of Article 2 of the Arbitration Law, the term "public order of the Republic of Kazakhstan" has been defined as "foundations of law and order [legal order] enshrined in legislative acts of the Republic of Kazakhstan".

2. An analysis shows that currently Kazakhstan's legislation quite clearly regulates the following situations:

(i) when an arbitral award of a domestic arbitrage, *i.e.* the one which functions on the territory of the Republic of Kazakhstan, contradicts to the public order existing in Kazakhstan (in such a case the arbitral award must be annulled by local court based on paragraph 2 of Article 52 of the Arbitration Law);

(ii) when the court finds that enforcement of an arbitral award rendered by a domestic arbitrage would contradict to the public order existing in Kazakhstan, even if the award itself is not contrary to the *ordre public* (in such a case the court in accordance with paragraph 1 of Article 255 of the Code on Civil Procedure

[1] The Civil Code of the Republic of Kazakhstan (Special Part) dated 1 July 1999 No. 409-I, as amended. Version in English (unofficial translation) at: https://adilet.zan.kz/eng/docs/K990000409_ [17 March 2025].

[2] The Law of the Republic of Kazakhstan "On Arbitration" ["On Arbitrage"] dated 8 April 2016 No. 488-V, as amended. Version in English (unofficial translation) at: https://adilet.zan.kz/eng/docs/Z1600000488 [17 March 2025].

[3] The Law of the Republic of Kazakhstan "On International Arbitration" dated 28 December 2004 No. 23-III (ceased to be in force). Version in Russian at: https://online.zakon.kz/Document/?doc_id=1052495&pos=4&pos=4;-103#pos=4;-103 [17 March 2025].

[4] The Law of the Republic of Kazakhstan "On [Domestic] Arbitrages" dated 28 December 2004 No. 22-III (ceased to be in force). Version in Russian at: https://online.zakon.kz/Document/?doc_id=1052490&pos=3;-51#pos=3;-51 [17 March 2025].

shall reject to issue a writ of execution for the enforcement of such arbitral award);

(iii) when, regardless of a country in which it was rendered (in essence, this applies to decisions of foreign arbitration tribunals): (a) an arbitral award itself contradicts to public order of the Republic of Kazakhstan, or (b) its enforcement on the territory of the Republic of Kazakhstan would be contrary to the public order of Kazakhstan even if the content of the award does not contradict the public order of the Republic of Kazakhstan (in such cases a Kazakhstani court shall, based on Article 57 of the Arbitration Law, refuse in recognition or, as the case may be, in recognition and enforcement of the arbitral award on the territory of the Republic of Kazakhstan; moreover, in accordance with Articles 503, 504 and sub-paragraph 2) of paragraph 1 of Article 255 of the Code on Civil Procedure a Kazakhstani the court shall reject to issue a writ of execution for the enforcement of not only arbitral awards rendered by foreign tribunals, but also foreign judicial decisions, if the court finds that enforcement of an award or a foreign court decision would contradict to Kazakhstan's *ordre public*);

(iv) when in cases regulated by legislative acts and/or international treaties of the Republic of Kazakhstan local courts and arbitration tribunals should resolve disputes in accordance with a foreign law as an applicable one, the courts and tribunals shall comply with Article 1090 of the Civil Code which: (a) constitutes a legislative restriction to apply foreign law if it would cause contradiction to *ordre public* ("foundations of legal order") of the Republic of Kazakhstan and (b) also requires that legislation of Kazakhstan shall be applied if an applicable foreign law contradicts to Kazakhstani public order.

Based on the above, it is clear that in Kazakhstan (as it is also common in foreign legal systems and international practice of application of conflict of law / private international law concepts) legislative provisions concerning *ordre public* shall be only used by courts when the courts decide on recognition and/or enforcement in Kazakhstan of arbitral awards and foreign court judgements, as well as when local courts and arbitrages apply foreign law to resolve disputes.

3. In 2024, however, the Constitutional Court of the Republic of Kazakhstan adopted its Normative Resolution where it expressed its recommendation to the Government of Kazakhstan "to consider an issue of further improvement of the legislation of the Republic of Kazakhstan on arbitration taking into account legal views of the Constitutional Court of the Republic of Kazakhstan set out in this normative resolution».[5]

[5] "Төрелік туралы 2016 жылғы 8 сәуірдегі Қазақстан Республикасы Заңының 52-бабы 3-тармағының Қазақстан Республикасының Конституциясына сәйкестігін қарау туралы" Қазақстан Республикасы Конституциялық Сотының 2024 жылғы 13 қыркүйектегі No. 51- НҚ нормативтік каулысы / Нормативное постановление Конституционного Суда Республики Казахстан от 13 сентября 2024 года № 51-НП "О рассмотрении на соответствие Конституции Республики Казахстан пункта 3 статьи 52 Закона Республики Казахстан от 8 апреля 2016 года "Об арбитраже". Versions in Kazakh and Russian can be downloaded from: https://adilet.zan.kz/rus/docs/S2400000051/info [17 March 2025].

An analysis of this Normative Resolution of the Constitutional Court shows that it considers the legislative definition of the term "public order of [in] the Republic of Kazakhstan" uncertain and therefore it "should be based on clear criteria which would allowing to distinguish lawful behavior from unlawful conduct with complete certainty and exclude any possibility of arbitrary interpretation of provisions of law". In that regard, the Constitutional Court proposed "to adjust respective terminology to ensure its certainty and clarity". In addition, for some reason it was also stipulated that for this purpose one should take into account principles of arbitration proceedings (such as party autonomy, independence, fairness, etc.) which, as it seems however, have no bearing on application of the aforementioned public order provisions by courts.

4. It is mentioned in the aforementioned Normative Resolution of the Constitutional Court that for the purpose of resolving the case concerning verification of compliance of paragraph 3 of Article 52 of the Arbitration Law to the Constitution of the Republic of Kazakhstan, an expert opinion of Prof. M.K. Suleimenov and Dr. A.E. Duisenova was heard by judges of the Constitutional Court. That expert opinion has been published on Internet resource and remains freely accessible.[6]

While I generally share the results of the analytical review and points of view contained in that expert opinion, in relation to the issue under consideration I consider it necessary to emphasize and unconditionally support the following conclusions of the aforementioned experts:

(i) "the concept of public order (*ordre public*, public policy) is rather vague, its application has been left entirely to judicial discretion" [the sources explain that although both these terms, the first used in continental legal systems, the second - in common law systems, are sometimes regarded as having the same meaning, they are not equivalent;[7] but consideration of this aspects is not the subject of this article];

(ii) determining whether an arbitral award or its enforcement is contrary to the public order of the Republic of Kazakhstan rests within the competence of the court and "when annulling an arbitral award on this basis, the court must justify which fundamental norms forming the basis of the legal order were violated, as well as how the arbitral award and its further execution will be contrary to public order"; and

(iii) "taking into account adoption by the Supreme Court of the Republic of Kazakhstan of the Generalization of judicial practice on the recognition, enforcement and annulment of arbitral awards established during 2016, 2017 and the 1st quarter of 2018, the Generalization of judicial practice on the recognition,

[6] Сулейменов М.К., Дуйсенова А.Е. Заключение экспертов по вопросу о соответствии Конституции Республики Казахстан пункта 3 статьи 52 Закона Республики Казахстан от 8 апреля 2016 года «Об арбитраже». Version in Russian at: https://online.zakon.kz/Document/?doc_id=35300658&pos=3;-91#pos=3;-91[17 March 2025].

[7] Thoma I. *Public policy (ordre public)*. Encyclopedia of Private International Law. Eds.: Jü. Basedow, G. Rühl, F. Ferrari and P. de Miguel Asensio. Edward Elgar Publishing, 2017. Vol. 2, 1854 p. P. 1454 – 1455.

enforcement and annulment of arbitral awards established during the period from 2019 to 2022, the Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated November 2, 2023 No. 3 "On certain issues concerning application of legislation on arbitration by courts", the definition of public order of the Republic of Kazakhstan provided for in subparagraph 1) of Article 2 of the Arbitration Law and [which] corresponds to Article 1090 of the Civil Code, can be considered sufficient".

5. It is well known that the term "*ordre public*" is a general and abstract concept and it should be determined only by judges / courts in each specific case of applying foreign law or deciding to enforce in their country a foreign judgment or an arbitral award made on the basis of foreign or national law. In a broad sense, a public order includes generally accepted moral standards ("local morality") and the prevailing social order in a given society which, in particular, serve as kind of limits in implementing the declared obligation of a national jurisdiction to apply foreign law in resolving legal situations, where applicable, and to recognize and enforce foreign judgments and arbitral award.[8]

In authoritative publications it's been particularly emphasized that "public order" is a general and abstract concept that is specified by the judge in each specific case.

In common law countries, public order is referred to as public policy, and its scope, degree and methods of application are determined through the evolution of case law (judicial practice).

In the most national civil law systems legislation contains a general public order (*ordre public*) clause and defines conditions for the application of the public order ground. For example, German law provides that foreign law may not be applied if, in a particular case, such application would be clearly incompatible with the fundamental principles of the German legal order, or if it would entail a violation of fundamental rights or human rights. In French law, this concept includes the principles of universal justice, which is widely recognized in the public sphere as having an absolute value, the fundamental principles of the national legal system, as well as provisions relating to the political, social and economic structure of the country; in addition, it is specifically regulated that any private (for example, contractual, but not only) arrangements cannot deviate from public policy and morality. And, as in common law systems, the concept of public order has been formed and developed within the framework of judicial practice (in some countries, such as France, taking into account legal doctrine).[9]

One should bear in mind that public order is a relative concept. Its content changes over time and territories, it is constantly evolving and reflects the current state of social values and morality in each given society.

The relative nature of this concept is further demonstrated by the fact that in all developed legal systems the court must consider all specific circumstances of

[8] Thoma I. *Ibidem*. P. 1453.
[9] Thoma I. *Ibidem*. P. 1453 – 1454.

the case before refusing to apply foreign law on a ground relating to public order. The logic in recognizing such relative nature of the concept of public order and in applying this concept in practice is as follows: despite the fact that abstract norms of foreign law may contradict the laws of a given legal system, in the specific circumstances of a particular case their application may be comparable with the provisions of the respective jurisdiction without contradicting its public policy. And conversely, the abstract rules of a foreign legal system may be fully consistent with fundamental values of the jurisdiction, but under certain circumstances an application of that foreign law may result in a significant breach of national law and/or a material conflict with public policy in that country.[10]

Having considered the competence of courts in respect of recognition and enforcement of arbitral awards (which, actually, also relates to enforcement of foreign court judgements), one should note that by bringing into effect provisions on public order the court does not express its attitude to the content of foreign law, but the court simply does not allow negative [for the respective national legal order] consequences of application of foreign law or recognition and enforcement of foreign court decisions or arbitral awards to manifest themselves in its country (within the framework of its jurisdiction, its national legal order). There is a very simple rationale for this: in any given case, a foreign law, judgment or arbitral award is considered to be harmful or offensive to the legal order of that court, while the values and principles protected by the laws of that country are too fundamental to be ignored or disregarded.[11]

Following the above consideration, it appears that, in accordance with the approaches widely accepted in foreign legal systems and recognized in international private law, the concept of public order cannot objectively be defined in law as an unambiguous definition with any clearer ("understandable") criteria, other than a reference to the widely accepted values and morality as well as social order existing in a given country.

6. The way how provisions relating to public order have been set out in acting legislation of Kazakhstan, how this term has been defined in the Arbitration Law, and the fact that it is left to the exclusive discretion of the court to decide (in each specific case of application of foreign law or recognition and enforcement of arbitral awards and judgements of foreign courts) whether public order is observed, it all corresponds to the notions of public policy and *ordre public* (which are also very general) recognized in foreign legal systems and at the international level.

This notion is intended to define, and it sufficiently defines, a framework for both a private discretion / behavior of the market participants or other persons and respective decisions of the Kazakhstani courts, to ensure a wide basis for generally accepted morality and social order existing in the country, as well as to observe fundamental rights and/or human rights.

[10] Thoma I. *Ibidem*. P. 1457.
[11] Thoma I. *Ibidem*. P. 1453.

It remains my belief that current wording of Kazakhstani laws is adequate and sufficient when it establishes that foreign law cannot be applied in the Republic of Kazakhstan as well as foreign court judgements and arbitral awards cannot be recognized and/or enforced if that leads to violation of or contradiction to the foundations of legal order (public order / *ordre public* / public policy) of the Republic of Kazakhstan.

Particularly, the norms of paragraph 1 of Article 1090 of the Civil Code (Special Part) of the Republic of Kazakhstan and subparagraph 1) of Article 2 of the Arbitration Law seem also adequate and being in full compliance with the generally recognized and widely perceived concepts globally. Even taking into account that in the legal doctrine the concept of *ordre public* is significantly fragmented and divided into different categories,[12] this is not a matter of the content of the law or legislative technique, but it is an issue of legal theory and methodology of application of legislative provisions related to public order (but consideration of this aspects is not the task for this article).

The foundations of the existing public order in Kazakhstan are enshrined primarily in declarations and provisions of the Constitution of the Republic of Kazakhstan. In addition, these foundations are further developed in relevant norms of the laws corresponding to the Constitution. They also receive further expanded or detailed legal regulation depending on the substance of the legal relationship, including either of: (i) for the purposes of application of national law in relations between private entities, (ii) for application of foreign law or (iii) enforcement of arbitration and foreign court decisions, as well as (iv) recognition of documents issued by official bodies of foreign states in cases provided for by national law

7. Since the internationally recognized concept of the *ordre public*, as in Kazakhstan, includes respect for human rights and freedoms, courts will inevitably have to resolve if the public order is or would be violated (and the court would face various dilemmas) when there is a conflict revealed between different elements included in the scope of the concept of "public order" or "fundamentals of the rule of law" according to a national doctrine or case law.

As indicated in relevant publications, the European Convention on Human Rights contains several different types of rights, or at least rights with "different weights". For example, such rights as the right not to be subjected to violence, the right not to be a slave and the right to life, *i.e.* the rights with substantial weight, have been distinguished. In particular, as an example, the right not to be subjected to violence can be called absolute, since there are no justifications important enough for them to prevail over this right. Those rights can also be called fundamental rights. In turn, other rights, such as the right to privacy, the right to freedom of expression and the right to freedom of assembly, are structured in such a way that other circumstances may be taken into account to

[12] Thoma I. *Ibidem*. P. 1456 – 1457.

determine whether they have been violated, thus qualifying them as non-absolute but still human rights. This means that, when the question arises whether there is a threat to public order, it is the courts (judges) who are vested with the power to interpret, balance, prioritize the protected foundations of public order, apply the so-called proportionality test when there is a conflict between protected rights, and so on.[13]

This aspect is important in the context that any modern legal order presupposes (at least declaratively) a respect for fundamental rights and many various human rights. But when assessing compliance of an arbitral award, a foreign court judgement or when applying a foreign law, a court is often made to take into account a conflict of rights of different social groups, to find a solution (and even to leave the case unresolved) in order to prevent a more serious violation of / contradiction to public policy than if a case would be resolved to protect rights of one social group but detrimental to rights of other persons /social groups.

And this, incidentally, highlights such a characteristic of public order that it includes generally accepted values and moral standards that are in force in a given society (within a given jurisdiction). As noted below, the court may leave the issue without a resolution on merits, not based on the current norms of law (in fact, leaving them unheeded) but guided by interests of preserving social tranquility and maintaining confidence in the State that, although it does not allow punishment for violations of law and rights provided for in the law, but it would not allow the violation to continue.

In his very interesting publication, a former South African judge, Albir Sachs, described how a difficult case with a clear conflict between freedom of speech, on the one hand, and offensive and provocative statements causing immeasurable moral distress to a certain group of the country's citizens, on the other hand, was resolved by the court. Both aspects relevant to relations regulated by law and both posed threats to the rule of law. The author of the said publication showed quite convincingly both that only a court can resolve such dilemmas, and how a court can resolve them. Moreover, the author actually substantiated that there can be insoluble dilemmas, because a resolution in favor of one or other party would put public order to an even greater problem than leaving the issue without a definite solution. He proposed that, in addition to provisions of law that should be perfectly clear, precise, and unforgiving, it is also reasonable to say that there are areas of law where categorical content of the law is harmful. For such cases it is appropriate to allow for context-specific deliberations during the hearings, for courts to apply the principle of proportionality in cases involving a tumultuous confluence of affected constitutional values, to encourage judges to maximize involvement of all parties affected by the case, to allow certain issues

[13] McCrudden Ch. *Dignity and Religion*. Islam and English Law: Rights, Responsibilities and the Place of Shari's. Griffin-Jones R., Ed. Cambridge University Press, 2013. 318 p. P. 95.

to be left open (also with a concern for the state of public order). In these cases, a certain vagueness of the law could be a good thing or better solution.[14]

It seems that this analysis also shows the inexpediency of a more detailed definition of the terms "public order" and "fundamentals / foundations of legal order" in the legislation of Kazakhstan compared to the current version of the definition of "public order of the Republic of Kazakhstan" as it set forth in the Arbitration Law

8. In view of the above, I would once again refer to the authoritative sources that analyze the practice of the developed jurisdictions, which shows that an attempt to "more clearly define" in law the term "public order / public policy" is not only inappropriate, but can be dangerous for a national legal system.

Particularly, it can be harmful for Kazakhstan's legal system, as it would create an unreasonable legislative framework for judges, limiting them only to what exactly this definition indicates as pertaining to the fundamentals of the legal order and what does not pertain to it, and leaving judges without a freedom and tools for resolving cases taking into account emerging legal dilemmas and conflicts between different fundamental principles that form the public order in Kazakhstan. This may also lead to violation of international treaties and other international obligations of the Republic of Kazakhstan, violation of human and civil rights, infringement of legitimate interests of citizens and organizations, impossibility to implement their legitimate interests, etc.

At the same time, it would be important to amend existing legislative definition of "public order of the Republic of Kazakhstan" contained in subparagraph 1) of Article 2 of the Arbitration Law with a direct reference (in addition to the reference to legislative acts) to the Constitution of the Republic of Kazakhstan as the main source of establishing foundations of the Kazakhstani legal order. This would be an additional reminder that norms of the Constitution have direct effect and their content pre-determines content of all other legislation of the Republic of Kazakhstan which cannot contradict the Constitution.

In addition, it seems that instead of unnecessary introduction of a proposed new definition of foundations of legal order of the Republic of Kazakhstan to existing laws, a much more promising and effective way to develop Kazakhstani law and improve our legal culture would be to solve the problem of insufficient quality training of legal professional and the judiciary, on the one hand, and to create effective mechanisms of interaction between the judiciary and the scientific community in the joint development of the legal doctrine and legal practice, on the other hand. It is judges and legal scholars who have a special responsibility to cooperate in the developing this concept by judicial practice, and to prevent any "more detailed legal definition" to cause undesirable for our country and our state arbitrariness of unreasonable or unjust law.

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[14] Sachs A. *In praise of 'fuzzy law'*. Islam and English Law: Rights, Responsibilities and the Place of Shari's. Griffin-Jones R., Ed. Cambridge University Press, 2013. 318 p. P. 225 – 235.